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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/649,938	08/27/2003	Daniel John Smith	1171/39464A/99A-	6085

279 7590 12/28/2007  
Trexler, Bushnell, Giangiorgi,  
Blackstone & Marr, Ltd.  
105 West Adams Street  
Suite 3600  
Chicago, IL 60603

EXAMINER
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PATEL, NIHIR B

ART UNIT	PAPER NUMBER
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3772

MAIL DATE	DELIVERY MODE
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12/28/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

Application No.

10/649,938

Applicant(s)

SMITH ET AL.

Examiner

Nihir Patel

Art Unit

3772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 12.04.2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,5 and 6 is/are rejected.
- 7) ☒ Claim(s) 2,4 and 7-10 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 12.04.2007.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Response to Arguments*

1. Applicant's arguments filed on December 4<sup>th</sup>, 2007 have been fully considered but they are not persuasive. The applicant states that Zwann does not disclose an enclosing outer wall defining a flexible gases passageway between the inlet and outlet, at least a region of the enclosing outer wall being of a material that allows the passage of water vapour without allowing the passage of liquid water or respiratory gases through the enclosure outer wall and the heating wire located within the passageway. The examiner disagrees. Zwann does teach an enclosing outer wall defining a flexible gases passageway between the inlet 2 and outlet 3, at least a region of the enclosing outer wall being of a material that allows the passage of water vapour without allowing the passage of liquid water or respiratory gases through the enclosure outer wall (see **page 5 lines 18-25**) and the heating wire located within the passageway (see **figure 7**).

The applicant also states that Zwann does not teach a water compartment having an inlet and an outlet or an outer wall. The examiner disagrees the water compartment 30 does have an inlet 45 (**page 6 lines 1-10**) and an outlet (**the water being evaporated and passing through the wall is defined as the outlet**).

2. The applicant also states that plastic cannot be defined as flexible. The examiner would like to point out that the applicant's specification has not provided a definition or an explanation of what the applicant regards as a flexible material and therefore the word "plastic" when defining it broadly is a material that is capable of adapting to varying conditions (flexible).

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims **1, 3, 5 and 6** are rejected under 35 U.S.C. 102(e) as being anticipated by Zwaan et al. (Patent GB 2 252 515 A).

5. **As to claim 1**, Zwaan teaches an apparatus that comprises an inlet **2** (see figure 7); an outlet **3** (see figure 7); an enclosing outer wall defining a flexible gases passageway between the inlet and the outlet, at least a region of the enclosing outer wall being of a material that allows the passage of water vapour with allowing the passage of liquid water or respiratory gases through the enclosure outer wall (see page 5 lines 18-25), and a heater wire **50** (see page 6 lines 10-15) located with the passageway (see figure 7), wherein the flexible conduit is of type suitable for conveying breathing gas to or from a patient (see abstract).

5. **As to claim 3**, Zwaan teaches an apparatus wherein the heater wire **50** (see page 6 lines 10-15) lies freely in the conduit to settle over at least some of its length at low points in the conduit where condensed water vapor may collect (see figure 7).

6. **As to claims 5 and 6**, Zwaan teaches an apparatus comprises an inner conduit, having an inlet **26**, outlet **26** and an enclosing outer wall, an outer conduit, having a second inlet and a second outlet (see figure 7), the inner conduit located within the outer conduit (see figure 7), the

inlet of the inner conduit and the second outlet of the outer conduit being located at a first end of the flexible conduit (**see figure 7**); and the outlet of the inner conduit and the second inlet of the outer conduit being located at a second end of the flexible conduit (**see figure 7**), and the heater wire **50** (**see page 6 lines 10-15**) located in a space between the inner and outer conduit (**see figure 7**).

*Allowable Subject Matter*

7. Claims **2, 4 and 7-10** are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The prior art does not teach a conduit being an expiratory limb.

*Conclusion*

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nihir Patel whose telephone number is (571) 272-4803. The examiner can normally be reached on 7:30 to 4:30 every other Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on (571) 272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Application/Control Number:  
10/649,938  
Art Unit: 3772

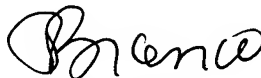
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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Art Unit 3772



Nihir Patel



PATRICIA BIANCO  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700

